

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

ROBERT STEINBUCH,	.	
	.	
Plaintiff,	.	
	.	CA No. 05-0970 (PLF)
v.	.	
	.	Washington, D.C.
JESSICA CUTLER,	.	Wednesday, April 5, 2006
	.	2:05 p.m.
Defendant.	.	
	.	
.....	.	

TRANSCRIPT OF MOTIONS HEARING
BEFORE THE HONORABLE PAUL L. FRIEDMAN
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiff:	JONATHAN S. ROSEN, ESQ. 1200 Gulf Boulevard Suite 1506 Clearwater, Florida 33767 908-759-1116
For the Defendant:	JOHN UMANA, ESQ. 6641 32nd Street, NW Washington, D.C. 20015 202-244-7961
Court Reporter:	BRYAN A. WAYNE, RPR, CRR Official Court Reporter U.S. Courthouse, Room 4808-B 333 Constitution Avenue, NW Washington, D.C. 20001 202-216-0313

Proceedings reported by machine shorthand, transcript produced
by computer-aided transcription.

1 P R O C E E D I N G S

2 THE DEPUTY CLERK: Civil action 05-970, Robert
3 Steinbuch versus Jessica Cutler. Mr. Rosen for the plaintiff,
4 Mr. Umana for the defendant.

5 THE COURT: Good afternoon.

6 MR. UMANA: Good day, Your Honor. I'm John Umana for
7 the defendant.

8 MR. ROSEN: And I'm Jonathan Rosen representing
9 Mr. Steinbuch.

10 THE COURT: Okay. How do you pronounce your last
11 name?

12 MR. UMANA: Umana.

13 THE COURT: It's your motion.

14 MR. UMANA: Thank you, sir.

15 Your Honor, this is a case about counsel on Senator
16 DeWine's staff on the important Senate Judiciary Committee
17 having a sexual relationship with a young, female, entry-level
18 staffer.

19 Mr. Steinbuch is asking this court to go beyond where any
20 court has ever gone before, to create a new tort, under the
21 guise of invasion of privacy or intentional infliction of
22 emotional distress, every time a former lover discloses a casual
23 sexual encounter.

24 This court should eschew Mr. Steinbuch's invitation. Were
25 plaintiff's theory accepted, anybody who has casual sex outside

1 of marriage could run into court and complain when a former
2 lover reveals details. There's not a single case that supports
3 such a massive extension of the law, and plaintiff has cited
4 none.

5 The complaint in this case, Your Honor, fails to state a
6 claim for relief on any cognizable legal theory, and the case
7 should be dismissed under Rule 12(b)(6) of the Federal Rules of
8 Civil Procedure, because they have failed to state a claim.

9 The plaintiff, Robert Steinbuch, Esquire, held an important
10 government post as Senator DeWine's counsel on the Senate
11 Judiciary Committee. Jessica Cutler at the time was a
12 25-year-old new staff assistant in the Senator's office.

13 As I will demonstrate, there are three separate grounds for
14 dismissal under Rule 12(b)(6). First, all the claims are
15 barred. Not most of them, all of the claims are barred in this
16 complaint under the one-year limitations period, under D.C. Code
17 12-301(4), and I'll get to that in a moment.

18 Second, I'll show that the complaint fails to allege the
19 material elements for invasion of privacy or the intentional
20 infliction of emotional distress, and hence, the complaint must
21 be dismissed as a matter of law on those grounds as well.

22 And finally, I will show that the complaint fails as a
23 matter of law because the matters publicized are of general
24 public interest and as such --

25 THE COURT: Well, don't spend much time on that one.

1 MR. UMANA: All right, sir.

2 THE COURT: Because they're not.

3 MR. UMANA: Okay. On a Rule 12(b)(6) motion to
4 dismiss, the court is to accept the allegations in the complaint
5 as true. Browning v. Clinton, 292 F.3d at 235, a D.C. Circuit
6 decision quoting Conley v. Gibson. But having said this, "We
7 accept neither inferences drawn by plaintiff if such inferences
8 are unsupported by the facts set out in the complaint, nor legal
9 conclusions cast in the form of factual allegations." 292 F.3d
10 at 242.

11 "Dismissal is proper when the court finds that plaintiff
12 has failed to allege all the material elements of his cause of
13 action." Weyrich v. The New Republic, 235 F.3d at 623, Your
14 Honor.

15 Now, in considering a motion to dismiss, it's important to
16 consider that the complaint itself attaches Exhibit A. Exhibit
17 A is a reproduction of Jessica Cutler's blog. Plaintiffs did
18 not have to attach that, but they chose to do so, sir. And that
19 has very significant consequences under Federal Rule of Civil
20 Procedure 10(c), because a copy of any written instrument which
21 is an exhibit to a pleading is part thereof for all purposes.
22 See People's Natural Gas Company v. Federal Power Commission at
23 127 F.2d at 156 in the D.C. Circuit 1942.

24 And indeed, in that case, Your Honor, the party -- where
25 the party did not deny the statements in his exhibit, they were

1 deemed to be admitted.

2 Now, anybody can set up a blog. Anybody can go -- and I
3 did a test yesterday myself on blogger.com. It just takes a
4 couple minutes. People use blogs all the time to keep personal
5 diaries. They can be private blogs or you can make it a blog
6 listed for publication. There's a distinction.

7 Now, the facts here are on May 5, 2004, Jessica Cutler
8 created her personal blog, <http://washingtonienne.blogspot.com>.
9 She was asked in the Settings area when you set up the blog:
10 "Add your blog to our listings?" Ms. Cutler said no. That's in
11 Jessica's declaration, paragraph 5.

12 THE COURT: I can't consider the declaration on a
13 motion to dismiss.

14 MR. UMANA: All right, sir. Unless the Court
15 chooses -- the Court has discretion to treat it as a Rule 56
16 motion --

17 THE COURT: Well, I'm not going to do that. If this
18 case doesn't get dismissed, you're going to take each other's
19 depositions, you're going to spend as much time as you want to
20 in a room with each other, get all of this in the public record,
21 embarrass the world.

22 I don't know why we're in federal court to begin with. I
23 don't know why this guy thought it was smart to file a lawsuit
24 and lay out all of his private intimate details in an appendix
25 to the complaint. I don't know why we're in federal court. I

1 don't know why you're wasting my time with this lawsuit. I
2 don't know why you're wasting my time with the motion to
3 dismiss.

4 Either you guys ought to settle this case or the plaintiff
5 ought to voluntarily dismiss the case, or let's move on to
6 discovery and summary judgment. Because I'm looking at the four
7 corners of the complaint, and unless you can persuade me they
8 haven't made out the elements -- it may be a stupid lawsuit, it
9 may be foolish, this guy may be laying his own sex life out on
10 the public record, and just repeating what she put on her blog
11 for whatever reason. And I'm surprised I didn't see an argument
12 in your papers that he's waived whatever rights he had by just
13 filing the complaint, because he spread it on the public record.
14 But I didn't see that.

15 MR. UMANA: Sir, I'm going to treat this as a 12(b)(6)
16 and not as a summary judgment.

17 THE COURT: Let's treat it as a 12(b)(6).

18 MR. UMANA: The Exhibit A to the complaint makes
19 an extremely significant admission, sir, and that is that
20 Ms. Cutler's blog was not in fact a public blog. Now, if we
21 look at page 1 of Exhibit A, sir, it states, "The original
22 Washingtonienne page was never cached by Google."

23 THE COURT: Where are you reading from?

24 MR. UMANA: From page 1 of Exhibit A, sir. And this
25 becomes part of the complaint for all purposes under Rule 10(c).

1 And if Your Honor looks at that, it's on the section under the
2 heading "Who restored it?" It says "The original
3 Washingtonienne page was never cached by Google." That's an
4 extremely significant admission, Your Honor.

5 And the reason is, this means that the blog was never
6 picked up, cached, listed, indexed or stored by Google. It
7 could not be located. As Ms. Cutler has said -- well, I'm going
8 to stay away from her declaration, but I don't need to rely on
9 her declaration because it's right here in Exhibit A, page 1.

10 This made it a private blog, sir, until on May 18, 2004,
11 somebody else ran to the blog site, ran to the cyber gossip
12 Internet site, wonkette.com, and they are the ones who made this
13 public.

14 Now, the complaint fails to allege that Ms. Cutler
15 disclosed her blog to Wonkette gossip site, and she didn't do
16 so. This was not a public blog until it was picked up by
17 somebody else. It was Wonkette that disclosed this, not my
18 client. So there is a fatal pleading deficiency in this case at
19 the very outset, Your Honor, and it should be thrown out. It
20 does not deserve to be in the federal judiciary. There was no
21 intention of my client to publicize anything.

22 Now, the postings in the blog. I was going to go into
23 those details. Your Honor has seen them. It's not until May 7,
24 2004, that the first posting as to Mr. Steinbuch, to which he
25 objects, comes forth. And that's about the spanking and

1 whatnot. That is when the statute of limitations begins to run,
2 sir: May 7, 2004, at 9:35 a.m.

3 Now, the blog also shows, and it's quoted verbatim in the
4 complaint itself, Your Honor, and it's attached as Exhibit A,
5 that he was joking around the office about this spanking matter,
6 that he was joking about it himself. There's clearly -- and,
7 "When he walks out of a room, he'll slap himself on the
8 backside." That's May 12 blog posting at 9:28. That's a waiver
9 right there. That's a waiver, sir.

10 These are devastating admissions that knock the complaint
11 out of the water as a matter of law, because they fail to plead
12 the elements of the claim.

13 Now, one, the statute of limitations bar. That's very
14 simple. There's a one-year statute of limitation here, sir.
15 The D.C. courts have applied the one-year limitation period for
16 defamation, D.C. Code 12-301, subsection 4, to invasion of
17 privacy claims for disclosure of private facts on the rationale
18 that invasion of privacy is a type of defamation. That's
19 Grunseth v. Marriott Corp., 872 F. Supp. at 1074.

20 Doe v. Southeastern --

21 THE COURT: But if it was a private blog, how --
22 limited to four people, how would he know on May 7, 2004, that
23 he'd been injured?

24 MR. UMANA: Your Honor, we have to go by the
25 allegations of the complaint. The complaint alleges at

1 paragraph 33, Ms. Cutler exposed private facts "on the Internet
2 for the entire world to read." If that's true, the statute
3 begins to run. That's the allegation of the complaint at
4 paragraph 33. It's repeated in the first paragraph of the
5 complaint, that "Cutler disseminated her blog on the World Wide
6 Web."

7 At paragraph 10 of the complaint, "Cutler published a
8 blog." Paragraph 30 of the complaint, "Cutler caused widespread
9 publication of private intimate facts." But the most
10 significant one I find, Your Honor, if we go by what the
11 complaint alleges, which we have to do under 12(b)(6), is
12 paragraph 33, that she "exposed private facts on the Internet
13 for the whole world to see."

14 Given that allegation, Your Honor, this entire complaint is
15 time barred, because any claim that would have begun to arise
16 accrued on May 7, 2004, Your Honor.

17 THE COURT: Only if he had a way of being made aware
18 of it. The discovery rule says that the statute of limitations
19 begins to run from the day that you know or should through due
20 diligence -- I'm paraphrasing -- could know of the existence of
21 the harm. And so if this were a private blog until someday
22 subsequent to May 7, 2004, and it was limited to four people,
23 how would he know he was injured until it was all made public
24 subsequent?

25 Now, there may be a question as to whether or not she made

1 it public or somebody else did, and whether she had any role in
2 its being made public, or whether it even matters whether she
3 had a role in it being made public. But if he could not have
4 known through due diligence what was being said from the day
5 that she started the blog until the day it was made public, why
6 doesn't the one year start to run from sometime after May 7?

7 MR. UMANA: Respectfully, Your Honor, we have to
8 take -- for a 12(b)(6), we have to take what they allege. If
9 this is true --

10 THE COURT: Where do they allege that it became a
11 public blog on May 7?

12 MR. UMANA: All through the complaint. All through
13 the complaint, sir. "Ms. Cutler exposed private facts on the
14 Internet for the entire world to read." That's right there in
15 the complaint. If that's true, and the Court has to assume it's
16 true under Conley v. Gibson, then it follows that this complaint
17 must be dismissed as a matter of law.

18 And I also want to call to Your Honor's attention something
19 that I didn't see in the briefing. I didn't write this motion.
20 I just came into the case.

21 THE COURT: I know.

22 MR. UMANA: The entire complaint is time barred under
23 the single publication rule, and that rule holds, for purposes
24 of the statute of limitations, the date on which it's first
25 generally available to the public is the date that the statute

1 begins to run. That's Mullin v. Washington Free Weekly, Inc.,
2 785 A.2d, at 298 note 2, D.C. 2001, citing Ogden v. Association
3 of U.S. Army, 177 F. Supp. at 499 to 502. That's a DDC case in
4 '59.

5 So May 7 is, under the single publication rule, is when the
6 statute begins to run. The issue about -- certainly the -- if
7 Ms. Cutler were here to testify today and this were not a
8 12(b)(6) hearing, certainly she would tell Your Honor she never
9 intended to make any of this public, and she took every
10 precaution to make it a private blog. But the complaint alleges
11 to the contrary.

12 THE COURT: What's the single publication you're
13 talking about? There were publications on several different
14 days between May 7 and May 18.

15 MR. UMANA: Right. And under the single publication
16 rule, the first one is when the statute begins to run. Years
17 ago there was a multiple publication rule, and you can see this
18 in the cases I've cited.

19 THE COURT: But that can't be right in a case like
20 this. Let's suppose that a jury were to find, if we ever got to
21 a jury, or I were to find that the first publication was on May
22 7, but the particular statement on May 7 wasn't offensive or
23 wasn't an invasion of somebody's privacy, or didn't meet the
24 other criteria, and the second one didn't and the third one
25 didn't either, but the seventh, eighth, ninth and 10th ones did,

1 and they were published --

2 MR. UMANA: That's right. Sure, of course. But here
3 on May 7, that's the first one he takes objection to. That's
4 the spanking, we had sex on May 6, we went and had drinks at
5 Union Station. That's the first one that he counts as
6 objectionable.

7 And that's why I -- the first entry about "RS" -- she
8 doesn't ever once mention his name. The first entry about this
9 "RS" is on May 6, but I'm not starting -- I don't think the
10 statute begins there. It begins on May 7, under the single
11 publication rule.

12 Now, under the intentional infliction of emotional
13 distress, the statute is also one year. And that's Browning v.
14 Clinton, 292 F.3d at 244, Saunders v. Nemati, 580 A.2d at 661 to
15 662. Where the cause of action is intertwined, as here,
16 Your Honor, with one for which the limitations period is
17 specifically prescribed, the specific period applies, the one
18 year.

19 Mullin v. Washington Free Weekly, 785 A.2d at 297, D.C.
20 2001, holding that because intentional infliction of emotional
21 distress was intertwined with the other claim, the defamation
22 claim, the one-year limitation period applied. And those cases
23 are briefed at motion page 16, Your Honor.

24 So the statute of limitation in my view bars the whole
25 thing. The only posting -- if you don't accept the single

1 publication rule, which is the law and should be accepted by
2 this court, the only thing that would be left is the May 18
3 posting, 2004. And all that says is that the couple had sex in
4 the missionary position and he used a condom. Clearly, not
5 actionable under any legal theory. So even in the alternative,
6 the May 18 posting can fail as a stated claim for which any
7 relief can be granted.

8 Okay. Argument No. 2. The elements of invasion of privacy
9 have not been alleged, and hence this court must dismiss the
10 complaint as a matter of law.

11 Five elements of an invasion of privacy, and I'm referring
12 to Wolf v. Regardie in the D.C. Court of Appeals, 553 A.2d at
13 1220. The elements are, No. 1, publicity; 2, absent any waiver;
14 3, given to private facts; 4, in which the public has no
15 legitimate concern; 5, which are highly offensive to a
16 reasonable person of ordinary sensibilities. That's Wolf v.
17 Regardie.

18 Now, publicity, I come back to the first page of Exhibit A
19 of the complaint. That shows, Your Honor, respectfully, that
20 there was no publicity. This was a private blog, it was not a
21 public blog. Publicity means that the matter is made public by
22 communicating it to the public at large. Sure, it's true that
23 if you go to blogger.com, it's on the Internet, but that doesn't
24 give everybody access to it.

25 I mean, I have blogs myself, and I want them to be public,

1 on questions of science and whatnot that I have blogs about, and
2 you have to take specific action so that it can be picked up by
3 Google and other search engines. She took action to keep it
4 from Google and to keep it private. And that's right in Exhibit
5 A to the complaint. As a matter of law, Your Honor, there was
6 no publicity here, and hence the complaint fails the stated
7 cause of action for invasion of privacy.

8 Indeed, the publicity that's required is that it be highly
9 offensive. And none of the things here --

10 THE COURT: Let's start with publicity first. At some
11 point someone took action to make it public.

12 MR. UMANA: Yes.

13 THE COURT: And at what point did that occur?

14 MR. UMANA: Apparently on May 18, 2004, she told three
15 people, and one told somebody else.

16 THE COURT: Before May 18?

17 MR. UMANA: Before May 18.

18 THE COURT: In other words, before May 18 there were
19 three people --

20 MR. UMANA: Only three.

21 THE COURT: -- that were receiving this private blog.

22 MR. UMANA: Yes, sir. And a friend of a friend is the
23 fourth person, apparently in San Diego. Somebody around May 18
24 disclosed this to wonkette.com, which is the cyber gossip Web
25 site in D.C.

1 Okay. Point No. 2. So there's no publicity. Point No. 2,
2 there was a waiver here. The right to privacy, like any other
3 personal right, Your Honor, can be lost by express or implied
4 waiver of consent, or by the course of conduct which prevents
5 its assertion. And here we have both kinds of waiver. Waiver
6 is a knowing relinquishment of a known right.

7 The blog attached to the complaint reveals that on May 11
8 Mr. Steinbuch informed Ms. Cutler about the rumor of spankings
9 had spread to other Senate offices. Blog entry May 11 at 5:54
10 p.m. That night at dinner the plaintiff told Ms. Cutler that
11 he's really not mad about the gossip at all, that he's actually
12 joking around the office about it, and that when he walks out of
13 a room, he'll slap himself on the backside. May 12 blog posting
14 at 9:28 a.m.

15 None of these facts were denied in the complaint,
16 Your Honor. There is simply no allegation in the complaint that
17 these facts were not true.

18 THE COURT: Wait a minute. That's separate from the
19 question of waiver. What facts are not true?

20 MR. UMANA: That he was joking in the office himself.

21 THE COURT: Okay. So he's joking in the office.

22 MR. UMANA: About the affair.

23 THE COURT: About one particular thing, the spanking.

24 MR. UMANA: Yes, sir.

25 THE COURT: There's a lot of other stuff in these blog

1 entries that he didn't joke about the office about, that he
2 didn't say anything to her about, that were on the blog. Lots
3 of other things.

4 MR. UMANA: I understand that, but my --

5 THE COURT: So I mean, are you saying that he's waived
6 his rights to privacy about the most intimate details of their
7 sexual relationship because he waived his rights about one
8 detail, which maybe he didn't consider quite as intimate, which
9 most people wouldn't consider quite as intimate.

10 MR. UMANA: Respectfully, Your Honor, I submit the
11 argument for your consideration. It's certainly true that what
12 the blog says is that what he joked about: This affair is all
13 over the office, it's going to other offices, the spanking, when
14 he walks out of a room he'll slap himself on the backside, to me
15 that's more -- that's conduct that constitutes a waiver. And I
16 just submit that to Your Honor. It's here and it's part of the
17 12(b)(6) motion.

18 THE COURT: I understand.

19 MR. UMANA: Three, it has to be private facts. Again,
20 how do you have private facts if this matter is being joked
21 about in the office? Respectfully, I think these were no longer
22 private facts if they had been at one point.

23 In addition, Mr. Steinbuch lacked any reasonable
24 expectation of privacy in having an affair with someone in his
25 office. The 9th Circuit has held, for example, that the right

1 of privacy is closely connected with the integrity and sanctity
2 of the family. That has always been the hallmark, Your Honor,
3 of privacy invasions in the law. Fugate v. Phoenix Civil
4 Service Board, 791 F.2d at 738, 9th Circuit, 1986.

5 I am simply unaware of any case creating a duty of lovers
6 in a casual sexual relationship not to disclose the details of
7 that affair.

8 THE COURT: It can't be that the right of privacy at
9 common law is limited to the family or to married people.

10 MR. UMANA: I'm not saying it's limited to, but I'm
11 saying that has certainly been the paradigm example of what the
12 privacy rights cover in the case law, if you look at the cases.

13 THE COURT: Well, certainly -- first of all, the
14 restatement invasion of privacy tort is actually four separate
15 torts, and the first one, which is unreasonable intrusion upon
16 the seclusion of another, may be the most basic one. But the
17 commentary to the restatement said the right of privacy has been
18 defined as the right to be let alone, and that's not just in the
19 family setting or in the marital setting or in the marital
20 bedroom, it seems to me. There may be a whole variety of ways
21 of invading that right or that interest.

22 MR. UMANA: I concede that. That's correct.

23 In which the public has no legitimate concern. Five, and
24 the fifth element, and which is highly offensive to a reasonable
25 person of ordinary sensibilities, Wolf v. Regardie.

1 I believe that the plaintiff's complaint fails to allege
2 the elements of an invasion of privacy. And you're right, there
3 are four different kinds, and the one, the sole invasion of
4 privacy which they tried to allege in the complaint is
5 disclosure of private facts.

6 They just have failed to do that, and Exhibit A knocks them
7 out of the water at the outset, Your Honor. That statement that
8 there was no publicity knocks them out of the water as a matter
9 of law. And they can't get around it, and it's futile to try to
10 amend.

11 Next, intentional infliction of emotional distress. That
12 wasn't pleaded properly either, in this complaint. That count
13 is at page 21 of the complaint. The elements are simply not
14 alleged. "To establish a claim for intentional infliction of
15 emotional distress, a plaintiff must prove that the defendant
16 engaged in (1) extreme and outrageous conduct that (2)
17 intentionally or recklessly caused (3) severe emotional distress
18 to another." Jung v. Jung, 791 A.2d at 50, D.C. Court of
19 Appeals in 2002.

20 Liability doesn't extend to mere insults or annoyances,
21 oppressions or other trivialities; it's only imposed when the
22 conduct goes beyond all possible bounds of decency and is
23 regarded as atrocious and utterly intolerable in a civilized
24 community. Waldon v. Covington, 415 A.2d at 1076, D.C. Court of
25 Appeals 1980.

1 Your Honor, they simply have not alleged these elements.
2 As a matter of law, this complaint cannot be permitted to go
3 forward under 12(b)(6).

4 Moreover, there's no intent. They don't even allege that
5 Ms. Cutler had an intention to purposely cause severe emotional
6 distress to this plaintiff. You have to allege that. They
7 failed to do that. If you look at page 21 of the complaint,
8 they simply failed to allege intention properly. This is an
9 intentional tort.

10 Moreover --

11 THE COURT: I think some of the cases in D.C. say
12 intentionally or recklessly.

13 MR. UMANA: Well, they have to say intentionally --
14 this is an intentional tort. This is not negligent infliction
15 of emotional distress. It's intentional. That's what they
16 claim.

17 Moreover, they fail to allege -- here's another one they
18 left out, Your Honor. They've got to allege specific physical
19 manifestations of the alleged severe emotional distress. That's
20 Abourezk v. New York Airline, 705 F. Supp. at 665, DDC 1989. In
21 Abourezk, Your Honor, the court granted summary judgment for
22 defendant on intentional infliction of emotional distress
23 because the record was devoid of any allegation that the
24 plaintiff had received physical or psychiatric treatment as a
25 result of the conduct complained of.

1 That holding applies here even though we're talking about a
2 motion to dismiss and not summary judgment. The basis is the
3 same, because there was no allegation that the plaintiff had
4 received physical or psychiatric treatment.

5 Your Honor, for all of these reasons, for all of these
6 reasons, the complaint has failed to state a claim, and it
7 should be dismissed as a matter of law. Thank you very much,
8 sir.

9 THE COURT: Thank you. Mr. Rosen.

10 MR. ROSEN: May it please the Court, Your Honor, my
11 name is Jonathan Rosen and I represent the plaintiff, Robert
12 Steinbuch, in this action.

13 To first address your concern regarding the salacious and
14 X-rated nature of this complaint, it is garbage and it's
15 horrible, and we're here because my client suffered harm
16 professionally, lost jobs, ruined his professional reputation
17 prior to this lawsuit being filed.

18 THE COURT: You need to go a little slower so the
19 reporter can get it all down.

20 MR. ROSEN: This harm he suffered, Your Honor, he
21 suffered prior to this lawsuit being filed. And I submit when
22 Googling his name prior to this lawsuit being filed, the
23 salacious, X-rated and horrible assertions made by -- including
24 the defendant and others, ruined his reputation, has lost jobs
25 as a direct result of, not filing this lawsuit, Your Honor,

1 which would have been to negate his name for Cutler's tortious
2 behavior, but lost it because of, for publicity and her
3 publishing -- publicizing her X-rated blog.

4 Unbeknownst to Mr. Steinbuch, Ms. Cutler, a self-admitted
5 liar and drug user, revealed and disseminated personal, private,
6 and intimate facts about Rob through her X-rated Internet Web
7 site blog, entitled Washingtonienne, on the World Wide Web for
8 everyone to read. She did not password protect it, even though
9 she's admitted to knowledge of password protection.

10 This court is well aware of the ubiquitous nature of the
11 material when it's placed on the Internet. In Blumenthal,
12 Your Honor, this court held that the Web is designed to be
13 inherently accessible from everywhere in the world, and never
14 before has it been so easy to circulate speech among so many
15 people once the word is written. It is disseminated to mass
16 audience literally with the push of a button.

17 Cutler invaded Rob's privacy by publicly disclosing private
18 facts, and made false statements and claims about Rob in her
19 public X-rated blog, painting Rob in a false light.

20 And Your Honor, of the four recognized -- well-recognized
21 torts of invasion of privacy, we are here and have pled public
22 disclosure of private facts, which by the way there's a
23 three-year statute of limitations on, and false light, in which
24 there's a one-year statute of limitation.

25 THE COURT: Where do you think you plug false light?

1 MR. ROSEN: Paragraph 31. Paragraph 31, in the
2 complaint, Your Honor, I'll read it to you, and also -- on
3 paragraph 31 I will quote: "Other private and personal facts
4 were scandalized to attract more attention. For example,
5 plaintiff's response to Cutler's question: 'Am I too lazy in
6 bed?' of 'I don't mind passive' was presented, and 'He told me
7 that he likes submissive women.' And finally, Cutler added
8 "apocryphal event." The definition of "apocryphal," which I
9 will submit to the Court, Your Honor, Merriam-Webster's
10 Dictionary defines "apocryphal" as fictitious. It's an
11 adjective, of doubtful authenticity. That's false.

12 And under the liberal pleading rules, Your Honor, certainly
13 that withstands any motion to dismiss on a false light claim.
14 In addition, Your Honor, the defendant has been well aware of
15 our contention of false light since, in lieu of filing an
16 answer, the defendant filed a motion to dismiss, in lieu of
17 filing an answer. And we responded immediately setting forth
18 the clarity of our claims.

19 Cutler's X-rated blog tracks events from May 5 through May
20 18, 2004. This action was filed on May 16 of 2005. Without
21 providing any discovery, Cutler filed a motion to dismiss. To
22 survive such a motion, the complaint need only set forth a
23 short, plain statement of the claims, giving the defendant
24 notice of the claims, and to the grounds upon which it rests.

25 First, Your Honor, the defendant admits that when they

1 filed their motion to dismiss, they introduced new evidence in
2 the form of an affidavit, or what they call as a declaration.
3 That's outside the complaint. And by attaching the affidavit of
4 Ms. Cutler, that alone, that action alone defeats the motion to
5 dismiss. Therefore, this court must deny the motion to dismiss.

6 THE COURT: He suggests that the other option, it is
7 an option in some cases, is to consider the affidavit, give you
8 the opportunity to file something, and then treat it as a motion
9 for summary judgment. But my initial reaction, which I stated
10 earlier, is that some discovery -- if the motion to dismiss was
11 denied, I think some discovery is required -- a whole bunch of
12 things, but even the issue of whether her blog was public, when
13 it became public, if it wasn't public initially. And you may
14 have some answers to that even without discovery. And she says,
15 but we don't know, that she took no actions to make it public.

16 But that goes to the statute of limitations, if it's a
17 one-year statute of limitations. But there may be other things
18 that we ought to have discovery on before there's any sort of a
19 motion for summary judgment.

20 MR. ROSEN: Your Honor, I agree. First the motion to
21 dismiss should be granted. There's no discovery --

22 THE COURT: You mean it should be denied?

23 MR. ROSEN: Should be denied, because it's improper.
24 Excuse me, Your Honor, it should be denied, because there is no
25 discovery taken and we never had any opportunity to respond to,

1 if it were a motion for summary judgment. And I would suggest
2 that if you were to convert it, the only purpose of converting
3 it would be to deny it.

4 With respect to the statute of limitations, Cutler admits
5 that her X-rated blog, and in their brief repeatedly, must be
6 read as a whole and in context, quote-unquote. They say must be
7 read as a whole and in context. The blog, she created it and, I
8 argue respectfully, Your Honor, made it -- publicized it for the
9 world to see on May 5, when it was first created. And read as a
10 whole and in context, it lasted through May 18.

11 Now, let me just speak a moment, Your Honor, about the
12 technicalities of a blog. A blog is one document. It is not
13 separate entries which are piece-parted out. It is in fact one
14 document that we attached as a copy -- not to make it public.
15 The whole world knew about this prior to the filing.

16 But for example -- and Your Honor, I know counsel is very
17 new to this case, and to set the record straight, his initials
18 were not used. On the first page of the blog, I'm holding it
19 right here, his name, Rob, R-O-B. That's not an initial,
20 Your Honor. That's Rob, his first name, and it's the name he
21 goes by. In addition to Rob, she also used the initials RS. So
22 it's Robert S. She also said he was Jewish, he worked on the
23 Hill, he worked for the committee of the judiciary, and he had a
24 twin sister, he lives in Bethesda. Identifying characteristics,
25 that he looks like famous people. I can go on and on,

1 Your Honor.

2 So just to set the record straight from here on in, they
3 did not merely use his initials to identify him. They used his
4 name specifically.

5 Second, when you view the log, it has to be viewed as one
6 document. In viewing it -- and a blog in and of itself is read
7 in context of one another. It cannot be piece-parted. And the
8 fact of the matter is, with respect to the statute of
9 limitations, I'm going to try to clearly lay this out as
10 possible.

11 With respect to the invasion of privacy claim, for our
12 public disclosure of private facts, that's three years. It's
13 clearly within three years, No. 1. No. 2, for the false light
14 claim, false light is one year, Your Honor, because it mirrors
15 and tracks defamation law. One year. This complaint was filed
16 May 16 of 2005. These events occurred from May 5 to May 18 of
17 2005.

18 Even by their own admission, we have statements which were
19 false on May 18, and also harmful on May 18. In addition to
20 being read as a whole, one key piece of the blog, for example,
21 there is a key in the middle of this blog, a key as in how to
22 identify people, distinguishing characteristics. So by
23 necessary requirement, in order for you, for example, when she
24 did use an initial, you have to go to the middle of the
25 document, to the key, which sets forth who is who with respect

1 to her -- so there's no way you can even read it without --
2 understanding the players, without looking in the middle of the
3 document.

4 In addition, she makes horrible references to his ability
5 to ejaculate or his difficulty in coming with using a particular
6 kind of condom. The only reason those are written is because
7 she makes previous references to prior days. So there's no way
8 to understand the entry on the 18th without referencing prior
9 entries on the 5th, 7th, 9th, 12th, and 14th.

10 So, with regard to the one-year statute of limitations,
11 taking the document as a whole, even by their own admission,
12 there was tortious action on the 18th, which is obviously within
13 the one year, and the entire document can't be parsed out, must
14 be read as a whole. None of the entries make sense -- and as a
15 matter of fact, by defendant's own admission, when you open up
16 the blog, it allows you to go back in time and actually change
17 the entries from previous days. It's not like they're date and
18 time stamped, that you can never go back.

19 And in fact, the defendant told the plaintiff that she in
20 fact on days went back to change a previous day's entry. So
21 these are not date and time stamped, and it's not as if any user
22 or viewer of a blog needs to go and open up particular days.
23 It's all one document, Your Honor. And like I said, as they
24 admitted over and over again, must be read as a whole and in
25 context.

1 THE COURT: Just sticking with the discovery theory
2 point, is it your contention that because she didn't use a
3 password, that your client could have as early as May 7 somehow
4 found this on the Internet?

5 MR. ROSEN: Well, someone prior to May 18 did in fact
6 find it. That's not in contention.

7 THE COURT: I know, before May 18.

8 MR. ROSEN: I'll even take their argument, their
9 argument which says that Cox, who publishes the Wonkette, in
10 fact did find it, that that's what they say. They say they
11 didn't notify her, she found it on her own. Well, if it's not
12 publicly available, how can you find it on your own? It doesn't
13 make any sense, Your Honor. Their argument belies one another.

14 They want to argue on this side that regarding the statute
15 of limitations, okay, regarding the statute of limitations is
16 one year and he should have known immediately on the 5th. And
17 over here they now argue that oh, no, no, no, you should have
18 discovered it immediately. I don't understand. You have to
19 choose one or the other. I mean, either it was public -- and I
20 submit, Your Honor, for our argument it was public on the 5th,
21 and a new document became public on the 6th, which includes the
22 postings from the 5th. It then is public -- every time you open
23 the document -- and the key, Your Honor, especially --

24 THE COURT: Well, your easiest argument to deal with
25 is that even if it never became public until the 18th, it always

1 republishes the earlier days, and therefore everything is part
2 of what's published on the 18th. That's the easiest argument to
3 deal with.

4 But beyond that argument, is the fact that she didn't
5 choose a password, and some of these other things, mean that
6 anybody or a creative user of the Internet could somehow have
7 come upon this blog, even though -- even if you accept for the
8 moment her statement that it was only made available to three
9 people or three of her friends, was it still technically, if not
10 easily available, nevertheless available to somebody?

11 MR. ROSEN: Your Honor, the facts -- first, the facts
12 entirely undercut her argument. First, the evidence in
13 discovery will show that she sent out a mass e-mail, a mass
14 e-mail before creating this blog. Mass e-mail to hundreds of
15 people requesting, should I put all this stuff on the Internet
16 or what? And the answer came out yes. That's a direct quote
17 and an admission from the defendant.

18 Second, she set up the blog for the alleged purpose of four
19 people. Well, Your Honor, you know for a fact, even if we take
20 their facts as true, that someone, Cox from the Wonkette, in
21 fact did find the information. So it's not even as if we have
22 to go to a theoretical objective standard. Someone in fact did
23 find, according to them, in fact did find it.

24 The fact of the matter is -- and here's the most damaging,
25 Your Honor. She, Cutler, when she created the X-rated blog,

1 hyperlinked to the Wonkette. That means she put a link there so
2 any reader of her blog could click and hyperlink to the
3 Wonkette. Now, when you hyperlink to the Wonkette or to
4 anybody's Web site, the person you hyperlink to knows that you
5 in fact put your hyperlink there. So I contend that the
6 hyperlink shows another manifestation of her attempt to
7 publicize.

8 But, Your Honor, if you look at the words themselves, if in
9 fact you look at her argument, which says she only was doing
10 this for three close friends, the lines in the document -- did
11 you read this stuff? It says "I'm a staff assistant or, quote,
12 staff ass, what the men on the Hill like to say. It's the
13 entry-level job in your office (for those of you who don't
14 know.)"

15 You're writing to three close friends about your alleged
16 involvement on the Hill and your personal matters. You would
17 know whether they knew what a staff meant -- it's so clear from
18 the language that it's written for a wide and -- she's clever --
19 and Your Honor, the reason why we're here is because, oh, she's
20 good. She's good at making this scandalous, self-promoting
21 herself, *Playboy* magazine, her cashing in on the activity,
22 Your Honor. And it's a key, the cashing in on the activity.

23 This material is not newsworthy. We shouldn't be here in
24 federal court. It's embarrassing, and it's embarrassing me here
25 to even be saying these words, that are not my words, that are

1 her words, Your Honor.

2 With respect to newsworthy, in order for something to be
3 newsworthy, it first has to be true. It has to be true. Some
4 of the material is not true in this document. Second, you have
5 to look -- let's look to her words themselves. Her words
6 themselves, quote, "If I were sleeping with a congressman,
7 maybe, but I'm a nobody. And the people I'm writing about are
8 nobodies." *Washington Post*. "The blog is really about a bunch
9 of nobodies fucking each other. I still can't believe people
10 care. I mean, I thought it was pretty typical."

11 Cutler told *Playboy*, "I wasn't doing anything
12 extraordinary. None of these people were elected officials, so
13 they don't deserve the scrutiny. It's not like I dated Dick
14 Cheney. If I had, I would have tried to cash in on that
15 earlier."

16 These are not my words, Your Honor. These are her words.
17 Why we're here in court, why you're angry, why my client
18 suffered, and why I'm here forced to defend him and to clear his
19 name, is because this trash and garbage which is out there.
20 It's absurd. Absolutely absurd.

21 If Your Honor is still considering the question of
22 newsworthy, I can go on and list ad nauseam the number of
23 ejaculations, the types of condoms, whether it's a thick condom
24 or thin condom, and how he comes or not. It's ridiculous. So I
25 will continue with the newsworthiness of this or --

1 THE COURT: I don't think -- I don't believe, as I
2 think I said this to begin with, that I did not think there was
3 anything to the defendant's argument that these were matters of
4 general public interest, which was his third of three points.
5 So I don't think --

6 MR. ROSEN: Yes. And it's not of legitimate public
7 concern. Thank you, Your Honor, for sparing me the
8 embarrassment.

9 Cutler admitted, I wrote an X-rated blog. Not newsworthy
10 issues, because the statements are false, and it's in our papers
11 and I'll submit to the litany of expressions used that clearly
12 show that.

13 With respect to the damage and why we're here, Your Honor,
14 this is about his name and professional association. And I know
15 firsthand from professional matters in which, and associations
16 in which he has been rejected and his name has been hurt, as
17 being associated with this lawsuit.

18 And Your Honor, the information that is out there saying
19 oh, he came forward with respect to his identity. His identity,
20 including his first name, was on the first page of the blog. He
21 was identified, for example, by a Web site -- the Cheshire Cat
22 Web site, while this story broke, which linked him as --
23 identified him -- Calico Cat, Your Honor, Calico Cat is a
24 popular underground site that discovered his identity. Well,
25 discovered it, they just read his name, Rob, and he's Jewish and

1 he works on the Hill and he lives in Bethesda, and they
2 identified him, and he was exposed prior to this lawsuit in fact
3 being filed.

4 Just to set the record straight with respect to the
5 pleading for intentional infliction of emotional distress, on
6 page 21 of our complaint, paragraphs 34, 38, and 39, we allege
7 defendant acted intentionally, defendant was reckless, the
8 widespread dissemination of the private facts have caused severe
9 emotional distress, humiliation, embarrassment, and anguish.

10 Turning to each element of the cause of action, the
11 invasion of privacy and public disclosure of private facts, we
12 don't disagree on the case law. The case law is clear. There
13 are five elements.

14 We have publicity. She admitted in her declaration she
15 made it public. By creating the Internet blog, that is in fact
16 publicity. In defendant's reply brief, that I know counsel
17 didn't write, but in defendant's reply brief on page 13, admits
18 the fact that it was public. They admit publicity. And in that
19 brief, they admit publicity, and they merely contend, oh, it's
20 publicity but it's public facts. They've already admitted
21 publicity. First element, therefore, must be satisfied.

22 Cutler wrote, "I was writing on the bathroom wall." "With
23 a blog you cannot expect your private life to be private
24 anymore." "Some people with blogs are never going to get
25 famous, and they've been doing it for like a year, or like over

1 a year. I feel bad for them." These are quotes, admissions by
2 the defendant in this action. Publicity has in fact been
3 satisfied.

4 There was no waiver. The contention about ass slapping or
5 office joking, that is in fact inaccurate and factually
6 inaccurate, and we contend in the complaint it's factually
7 inaccurate. This isn't privileged information, nor was there
8 any waiver. And even if the Court would find speaking about it,
9 mentioning it in the office would be a waiver, there's a whole
10 litany of other information which was not.

11 In her own statement, she says in here that Rob is a
12 discreet person. She admits that Rob is a discreet person and
13 understands the importance of his discretion and recognized the
14 fact that he was upset.

15 Given to private facts. The number of times he ejaculated,
16 all the garbage which I will not state again, I contend they are
17 private facts, they're not public. And it's hornbook law that
18 sexual activity in the bedroom, even including someone, that is
19 the paramount of private information. That's why bedrooms have
20 doors on them. The case law has held that explicit sexual
21 material are the epitome of private facts.

22 Again, the fourth element, there's no legitimate concern.
23 There's no legitimate public concerns here. And we shouldn't
24 even be here.

25 And finally, would be highly offensive to a reasonable

1 person of ordinary sensibilities. Your Honor, I submit to you
2 that case law has made it clear that's a mixed question of law
3 and fact. The judge must first determine whether there is room
4 for the material to be highly offensive to a reasonable person
5 of ordinary sensibilities. I submit as a matter of law, you
6 would rule that this as a matter of law is offensive to an
7 ordinary reasonable person, but certainly there's room for a
8 jury to decide that.

9 Second, with respect to false light, that Cutler published
10 material that placed him in a false light that would be
11 offensive to a reasonable person. She had knowledge and she
12 acted recklessly with regard to the falsity and the publicity of
13 the material. She said false things, and the false things
14 include that he liked to do freaky shit, fucked every way, likes
15 to talk dirty, stated that he would be using handcuffs on her,
16 enjoyed hair pulling, had sex like nasty animals, would get
17 turned on by her being scared and panicky, and that he told her
18 that he likes submissive women.

19 These are not true. The statements are not true, and place
20 the defendant in a false light.

21 THE COURT: It's not true that he said these things?

22 MR. ROSEN: Not true that -- the statements he made --
23 he did not say those things. He did not tell her that he likes
24 submissive women, that's right.

25 THE COURT: So presumably you're going to try to

1 establish the falsity of that by deposing her under oath?

2 MR. ROSEN: And deposing him.

3 THE COURT: And deposing him.

4 MR. ROSEN: Right. He will testify here today that he
5 did not say that. Right here, he'll say that he did not say
6 that.

7 THE COURT: That's all right. We're here on a motion
8 to dismiss, remember?

9 MR. ROSEN: That's right. It's a professional injury,
10 Your Honor. The real harm in this case is the injury to his
11 reputation and his profession. He's an attorney, counsel for
12 the judiciary, and law professor, and has and continues to
13 suffer harm as a result.

14 Your Honor, I submit to you the ubiquitous nature of the
15 Internet, each of his students now Googles his name. Google his
16 name. Google "Steinbuch." Put it in there. See the first
17 thing that comes up. The first thing that comes up -- see the
18 first five entries that come up, Your Honor.

19 He teaches legal ethics and professional responsibility.
20 Comments, snickering. It's not funny. It's not funny and it's
21 damaging. It's horrible, absolutely horrible.

22 If you have any questions, Your Honor.

23 MR. UMANA: There's no question, Your Honor, that the
24 things of which the plaintiff's counsel complained are sad, sad
25 matters. That's not the issue before the Court today. The sole

1 issue before the Court is whether the plaintiff has stated a
2 case, has stated the material elements of the claims, and has
3 filed a complaint on time.

4 And hearing the argument and the very emotional argument of
5 plaintiff's counsel, what he's done is just reemphasize that
6 this complaint, the one he filed, he can't ride with. He needs
7 to recast his complaint and make it a complaint about false
8 light. But that's nowhere to be found in this complaint.

9 And this complaint should be dismissed, Your Honor, because
10 it fails to allege the elements of the claims. And moreover,
11 the statute of limitations, I just heard Mr. Rosen state that
12 indeed on May 5, 2004, she made it public for the whole world to
13 see. That's a quote, as best I could write it down.

14 Well, that kills them on the statute of limitations. None
15 of the cases, incidentally, Your Honor, talk about the possible
16 application of the discovery rule. We haven't seen any cases
17 cited on either side that apply the discovery rule to invasion
18 of privacy here.

19 But moreover, the theory of the complaint, what the Court
20 has to go by, is what the complaint alleges. And I said this
21 earlier, Your Honor, but throughout this complaint, the
22 complaint alleges that this blog and these statements were
23 public and they were on the Internet.

24 I made a separate point about page 1 of Exhibit 1, because
25 page 1 of Exhibit 1, they chose to put that in there, they

1 didn't have to but they chose to put it in. It kills them.
2 It's devastating to their case, because it proves that my client
3 wasn't intending to publicize this.

4 Now, they just made another statement -- I didn't see this
5 in the complaint, but they said that she put in a hyperlink.
6 That's not true. That's not alleged. And Exhibit A is right
7 here. There's no hyperlink there. I don't know why they said
8 that. It's just not true. It's not -- in considering the
9 12(b)(6), we can look at Exhibit A, and it's not there.

10 Now, the sad fact here is that my client only referred to
11 "RS," and apparently at one point "Rob." But nowhere did she
12 identify this individual. Nowhere did she identify, throughout
13 this blog, her private blog. Could some people maybe in the
14 office have figured it out? Sure, but that's not publicity.
15 Making it available to the public at large under the cases I
16 cited, Your Honor. It just isn't there. It just isn't there.

17 That's the whole reason plaintiff's counsel is struggling
18 to rewrite his complaint. Now it's a complaint about false
19 light. Well, what does paragraph 31 say? Paragraph 31 is the
20 only place in the entire complaint that takes issue with
21 something that's said in the blog in terms of mischaracterizing
22 the -- she says in the blog, well, he likes submissive women.
23 He says well, I didn't really say that. What I said was
24 something a little different.

25 That's the only place in the entire complaint, paragraph

1 31. False light isn't even mentioned in the complaint. It's
2 silly for them to be arguing a whole new legal theory when the
3 complaint that they've stated fails to allege the elements of
4 the complaint.

5 Now, we also heard plaintiff's counsel argue about the
6 password protection. There is no possible way to do that. I
7 ran a test yesterday myself, Your Honor. The question that
8 comes up: "Add your blog to our listings?" She put in "no."
9 She put "no." A public blog appears in your blogger profile.
10 If you select no, we will not show your blog anywhere on
11 blogger.com. There's nothing about passwords or not.

12 I don't know if it's possible to use other blog sites where
13 you can use password protections, but what I can represent to
14 this court is it was not possible to use a password protect.
15 What she did was limit the URL to three friends and a friend of
16 a friend, and that was it. That's simply not publicity.

17 I'm not saying this is a happy case. It's not. It's a
18 very sad case. But I'm also telling the Court that this case
19 doesn't even come close to alleging the timely filed complaint.
20 It's not there. They waited too long to file this case. They
21 waited too long. And waited to find out that she was getting
22 advance on a book or whatever. It has nothing to do with the
23 causes of action alleged.

24 As a matter of Rule 12(b)(6), Your Honor, there is no way
25 that this complaint can stand, respectfully. Thank you so much.

1 MR. ROSEN: May I briefly respond, Your Honor?

2 THE COURT: Yes.

3 MR. ROSEN: Plaintiff's counsel is not making up the
4 word "false" or "apocryphal." The word "apocryphal" is in the
5 complaint. If he doesn't have a dictionary, I can lend him
6 mine. There is the dictionary definition of the word
7 "apocryphal," with respect to fictitious or false. I understand
8 in the future I'll restrict my vocabulary to not as fancy of
9 words.

10 Regarding the declaration and regarding attaching, it's
11 absurd, their argument. We attached a copy of the blog to prove
12 its existence, that it is what it is. Not the contents. It's
13 not the truth of the matter asserted. We don't -- if that were
14 the case, Your Honor, you could never have a defamation case or
15 a false light case. By merely attaching the document we somehow
16 ascribe to the truthfulness of the document? No, we're
17 attaching it to say there's where the false stuff is. That's
18 why it's there.

19 With respect to the hyperlink, it's a matter of record. It
20 is on there. And just to set the record straight, first we --
21 we didn't use his name, just his initials. Okay. Well, now we
22 used his initials and his name, on the first page, "Rob." And
23 he used his religion. And he used where he worked. And he used
24 where he had a twin sister. And he used that he lived in
25 Bethesda, Maryland. And he used that he was counsel for the

1 judiciary. And he used descriptive physical -- of his naked
2 body.

3 So it's completely disingenuous for them to argue that he
4 was not identified. He was clearly identified. In addition,
5 the objective facts show he was identified because third parties
6 in fact -- the Calico Cat -- found out that it was him. Not
7 office people, not some intimate knowledge. Third parties,
8 objective third parties found out.

9 Yes, and the harm started on May 5. And it was on May 6,
10 and on May 7, and continued through May 18. So regardless of
11 the statute of limitations, certainly No. 1, for public
12 disclosure of private facts, that's three years. So that's in,
13 regardless.

14 With respect to one year, at best it could be as of the
15 16th. Even if Your Honor were to rule, and I suggest of course
16 you do not, that it were not, the material that falls outside,
17 on the 18th, certainly survives the statute of limitations, and
18 certainly because, using their own words, read as a whole and in
19 context -- their words, read as a whole and in context -- the
20 18th addition to the document, which is one document, which I
21 remind Your Honor was changed in the past, must be taken as a
22 whole.

23 And thank you for your time and your understanding.

24 THE COURT: Is there something else you wanted to say?

25 MR. UMANA: Just one last word. And I can feel the

1 tension in this room. I don't think I've ever been in a
2 12(b)(6) hearing like this in my life in 30 years of practicing
3 law in Washington.

4 MR. ROSEN: And I've never been in a case like this in
5 my life, Your Honor.

6 MR. UMANA: But the fact is that under the single
7 publication rule, and that's the law in the District of
8 Columbia, Your Honor, Mullin v. Washington Free Weekly, 785 at
9 298, note 2, you've got to go by the first publication of
10 something that they consider a disclosure of false -- of private
11 facts.

12 That's May 7, 2004. May 7, 2004 is when the statute runs
13 through the whole thing. He had to act promptly, within a year.
14 That's the law in the District of Columbia, and that's the
15 statute, and they failed to file the complaint on time.

16 Apart from the fact that they failed to allege the claims
17 and now are trying to rewrite them, it's just not a close
18 question. They're out of court on the statute of limitations.

19 THE COURT: So the first time you're defamed, even if
20 there are 20 separate statements later and each one is worse
21 than the last, you have to bring the lawsuit within a year?

22 MR. UMANA: That's what this rule holds, and it's the
23 law in the D.C. Court of Appeals, and it's what governs in this
24 case. Thank you, sir.

25 THE COURT: Which case are you talking about again?

1 MR. UMANA: That's Mullin, M-U-L-L-I-N, versus
2 Washington Free Weekly Inc., 785 A.2d 296 at page 298, note 2.
3 D.C. Court of Appeals 2001, citing several other cases,
4 including a case in the district court here, Ogden, which is 177
5 F. Supp. at 499 to 502, Your Honor. That's a DDC case in 1959,
6 sir. This is the law that governs this case. Thank you, sir.

7 THE COURT: Why don't we take about a 15-minute break
8 and I'll try to come back and decide this.

9 (Recess from 3:06 p.m. to 3:28 p.m.)

10 THE COURT: What I'm going to do is give you a brief
11 oral opinion on the motion to dismiss, rather than do anything
12 in writing, because it's just easier and faster. So if
13 anybody -- so there won't be a written opinion, it will just be
14 an order denying the motion to dismiss for the reasons that I'm
15 going to state now. So if anybody wants the transcript, you can
16 order the transcript.

17 Briefly, as set forth in the complaint, the relevant events
18 in this case took place over a period of around two weeks in May
19 of 2004 when the defendant, Jessica Cutler, was working as a
20 staff assistant for Senator Mike DeWine of Ohio. And according
21 to the complaint, she was having, unbeknownst to the plaintiff
22 at the time, I guess, she was having sex with a number of
23 different men, and she created a blog on May 5, 2004, on a blog
24 site, and that's set forth in Appendix A to the complaint.

25 As I understand the allegations, the blog did not require a

1 password to be read, and the plaintiff alleges based on that and
2 some other things that it was a publicly available blog and
3 anybody -- not anybody but lots of people could have had access
4 to it. The defendant says that that's not so and that she
5 really only included three people in the blog initially, and
6 that it was -- she did not distribute it beyond those three
7 people plus one fourth person who was a friend of one of those
8 three.

9 That, of course, is set in the briefs in this case and in
10 the declaration that Ms. Cutler has submitted. For the reasons
11 I suggested during oral argument, since this is a motion to
12 dismiss under 12(b)(6), I'm not going to consider the
13 declaration at this point.

14 Mr. Steinbuch's involvement began on May 6, 2004, when he
15 first went out for a drink with her, and over the next 12 days
16 she wrote about him and their sexual relationship on her blog.
17 She referred to him by his initials, "RS," she referred to him
18 as "Rob," she referred to him in other respects. I can't recall
19 whether it says in the complaint -- and the complaint says it
20 identified him as a committee counsel of the Senate Committee on
21 the Judiciary, identified his place of residence, said that he
22 had a twin, described his general appearance, and provided
23 details of the intimate relationship between the plaintiff and
24 the defendant.

25 On May -- and all of this is set out in detail in the

1 complaint and the appendix to the complaint. This relationship
2 began on May 6, and according to the complaint ended on May 18.

3 Meanwhile, there was an Internet gossip site known as the
4 Wonkette by Anna Marie Cox. And on May 18 the Web site
5 wonkette.com posted a link to the defendant's, Ms. Cutler's
6 blog, and described Ms. Cutler's blog's contents and republished
7 excerpts on the Wonkette Web site, and also linked to that blog.
8 And from there it was, according to the complaint, widely
9 disseminated beyond that.

10 Ms. Cutler apparently took the blog down from the Web site
11 on or shortly after May 18. She was fired from her job with
12 Senator DeWine, she subsequently wrote herself for wonkette.com,
13 posed for Playboy, gave interviews, and wrote a novel, which
14 apparently Sarah Jessica Parker's company is now interested in
15 making into a television show.

16 Now, the lawsuit was filed on May 16, 2005, which is
17 certainly less than one year after May 18, 2004, but more than
18 one year after the date this all began, which is on May 6, 2004.
19 The complaint alleges two common law torts, one for invasion of
20 privacy for one for intentional infliction of emotional
21 distress.

22 We're here on the Defendant's Motion to Dismiss the
23 Complaint for failure to state a claim under Rule 12(b)(6) of
24 the Federal Rules of Civil Procedure. And as I mentioned,
25 Ms. Cutler has, through counsel -- through her former counsel,

1 has attached a sworn declaration.

2 On a motion to dismiss for failure to state a claim, the
3 Court is to assume the truth of the facts alleged in the
4 complaint. It's not supposed to go outside the four corners of
5 the complaint, and can grant a motion to dismiss for failure to
6 state a claim only if it appears beyond doubt that the
7 complainant will not be able to prove any of the facts set out
8 that would justify relief.

9 The complaint is construed liberally in plaintiff's favor
10 in a motion to dismiss, and the Court should grant the plaintiff
11 the benefit of all legitimate inferences from the facts that
12 have been alleged, but the Court need not accept factual
13 inferences if the inferences are not supported by any facts
14 alleged, and must not accept any legal conclusions.

15 So clearly if there's a failure to allege all the elements,
16 or under no set of facts and circumstances would a particular
17 tort be able to be proved, then it's proper for a motion to
18 dismiss. Or as I said, if the facts alleged wouldn't make out
19 the tort.

20 The defendant argues that the invasion of privacy claim
21 should be dismissed because the plaintiff had no reasonable
22 expectation of privacy in his sexual relationship with Cutler,
23 that the plaintiff waived whatever rights he might have had,
24 that the facts disclosed were already public by the time they
25 were disclosed in the blog, that the defendant was not the one

1 who publicized the blog, and that there was a legitimate public
2 interest in all of these matters, I guess because people are
3 interested in sex and politics and the interrelationship between
4 them.

5 I'm thinking of Fanne Foxe in the reflecting pool, for
6 those of you who are old enough. I think it was the reflecting
7 pool.

8 In any event, the second claim is for intentional
9 infliction of emotional distress. And the argument is that, A,
10 there's a failure to meet the statute of limitations, which the
11 defendant says is one year, and secondly that the complaint
12 doesn't make out either an emotional distress claim or an
13 invasion of privacy claim.

14 Most of what the defendant argues with respect to the
15 invasion of privacy claim involves facts and interviews and
16 statements in the briefs about what actually happened or didn't
17 happen. Whatever's in Ms. Cutler's declaration, whatever
18 assertions of fact either side makes in the briefs are really
19 not relevant in a 12(b)(6) motion. What's relevant is what's in
20 the complaint itself and whether it makes out a claim for
21 relief, and whether, if these facts are proved, the plaintiff
22 has a claim.

23 As we discussed earlier, an invasion of privacy really is
24 four separate torts, and the District of Columbia courts have
25 adopted the restatement in the second American Law Institute's

1 restatement of torts section -- I guess it's Chapter 22A. And
2 in Section 652A the restatement says one who invades the right
3 of privacy of another is subject to liability for the resulting
4 harm to the interests of the other. And then it says the right
5 of privacy is invaded by, and there are four separate entries,
6 each of which is considered a separate tort. Two of them
7 clearly do not apply here, are not alleged here.

8 The plaintiff says he has alleged the third of the four,
9 unreasonable publicity given to the other's private life, and
10 says also that, although somewhat obliquely, they've also
11 alleged in paragraph, I think it was 31, the fourth of these
12 four torts, publicity that unreasonably places the other in a
13 false light before the public.

14 The elements of the first, one who gives publicity to a
15 matter concerning the private life of another is subject to
16 liability for invasion of privacy if the matter publicized is of
17 a kind that would be highly offensive to a reasonable person,
18 and it's not of legitimate concern to the public.

19 So, the key case which discusses the fact that there are
20 essentially four constituent torts, and the elements of them, is
21 Wolf v. Regardie, which I think both sides have cited, at 532
22 A.2d 1213. And while a plaintiff may in fact bring suit on two
23 or more of these constituent claims, at the end of the day
24 there's only one recovery, regardless of which theory.

25 The more clearly stated of plaintiff's claims is the third

1 of the four under the restatement, invasion of privacy,
2 unreasonable publicity given to another's private life, in
3 paragraphs 30 through 34 of the complaint. And in paragraph 31,
4 the plaintiff says "Other private and personal facts were
5 scandalized to attract more attention. For example, plaintiff's
6 response to Cutler's question: 'Am I too lazy in bed,' 'I don't
7 mind passive' was presented as, 'He told me that he likes
8 submissive women.'" And finally, "Cutler added apocryphal
9 events."

10 I think the public disclosure of private facts claim has
11 been clearly pled, as I said, in paragraphs 30 to 34. The false
12 light claim is at best somewhat difficult to discern, but I
13 think under Rule A it's enough, it's there. And certainly the
14 plaintiff is on notice of the fact that it's there. If
15 plaintiff wanted to amend his complaint to make it more
16 explicit, obviously the plaintiff could do it as of right now,
17 because no responsive pleading has yet been filed, and always
18 could move to do so.

19 But I think in view of the reading of that one paragraph,
20 alongside a dictionary, as Mr. Rosen suggested, there's enough
21 there to survive, although barely, a motion to dismiss on that
22 particular theory, and there's certainly enough to survive a
23 motion to dismiss on the other theory.

24 Now, let me deal with the defendant's arguments. And
25 again, these are arguments that, in order to dismiss, I would

1 have to accept as a matter of law. The first is that there's no
2 reasonable expectation of privacy because it's not in a family
3 situation, people who have casual affairs can't expect things to
4 remain private, and so forth.

5 And it may in fact be true that the fact of a relationship
6 with someone you don't know well, you might be engaging in some
7 sort of blind trust with someone you have no reason to
8 completely trust not to disclose the fact of the relationship.
9 But the details of what occur in the bedroom are classic
10 examples of normally private facts under this particular
11 invasion of privacy theory. There's discussion of it in the
12 restatement itself, there are a whole series of cases.

13 The cases that are cited by the defendant to the contrary,
14 the Rhode Island case, rely on a particular Rhode Island
15 statute, and one other case, do not persuade me to the contrary.
16 I suppose it's possible that after discovery it could be shown
17 that Mr. Steinbuch had no reasonable expectation of privacy, but
18 certainly not on a motion to dismiss.

19 With respect to the waiver argument, you know, the fact
20 that plaintiff knew that some of his coworkers knew that they
21 went and had a drink together and may have seen them together,
22 the fact that the plaintiff knew that Ms. Cutler told coworkers
23 about the fact that he enjoyed spanking, and he said that was
24 okay, and the fact that he joked about it, all of which, if one
25 accepts that as true -- although again on the motion to dismiss

1 the plaintiff disputes much of that, maybe not all of it, but
2 much of that -- it seems to me that that does not constitute a
3 waiver of all of these details that she put on the blog and that
4 she communicated with others. It fails as an argument to
5 dismiss the complaint.

6 This is an overly broad view of waiver in my opinion. Even
7 if the defendant's version of the events is true, on a motion to
8 dismiss for failure to state a claim, it's not the defendant's
9 version of events but the plaintiff's version of events as set
10 forth in the complaint that I need to rely upon. That's both
11 his waiver argument and part of his argument that it's not
12 private if it was being joked about in the office.

13 With respect to that issue of privacy, as I said a minute
14 ago, it's not the fact of the sexual relationship that is the
15 private fact that Mr. Steinbuch is basing his complaint about,
16 it is the revelation of specific details of the sexual
17 relationship and the sex between the two of them. The fact that
18 he may have acknowledged to some coworkers that he was having a
19 relationship with her does not constitute a waiver of his right
20 to privacy with regard to every aspect of that relationship,
21 including details of sexual encounters.

22 And in fact, to the extent that that disclosure that they
23 had seen each other, or that the spanking incident occurred
24 early in this 12-day period, it certainly wouldn't be a waiver
25 of everything that happened thereafter.

1 The defendant says that she took action not to make it
2 public by limiting it to three people or four people, and
3 there's no indication that she made it public. Well, I think
4 that's a highly intensive factual question, exactly -- it's
5 factually intensive in a couple of different ways. One is just
6 sort of the technical stuff we've been talking about today about
7 how a blog works, or how this blog worked, whether or not there
8 was a hyperlink, whether the failure to put in a password, what
9 the implications of that were. All of those sorts of things.
10 How Ms. Cox learned about it initially. Those are sort of the
11 technical aspects of it.

12 The other aspect of it is whether or not Ms. Cutler took
13 steps on May 7 or May 8 or some other date to make it public
14 herself, or whether it was somebody else who made it public,
15 beyond her. Another aspect of whether it was private or public,
16 and what was private or public, which I hadn't thought about,
17 although it may have been in the briefs and it was mentioned
18 today, the fact that people can change things on a blog, that
19 what she may have entered on May 7 may in fact have been changed
20 by the time it was made public, if it was made public some days
21 later, by her.

22 And to the extent that -- maybe I'm repeating myself here,
23 but to the extent that plaintiff argues that she's responsible
24 for publicizing the blog to the larger world beyond these three
25 or four people, either as the anonymous tipper to Wonkette or

1 though other actions, linking the blog to Wonkette or otherwise,
2 that's clearly a fact question that we can't decide today.

3 The other thing that is a little bit complicated perhaps,
4 but I don't think I need to decide at this point, is the term
5 "publicity" in this tort, in this type of invasion of privacy
6 claim, the publication of a private matter, or the publicizing
7 of a private matter is different from publication as that term
8 is used in defamation, and that's made clear in the comment to
9 section 652D of the restatement.

10 So I think we need discovery on a lot of these things,
11 including specifically what role Ms. Cutler played in the
12 publicizing or the making public of these matters. I will say
13 this, that how many people have to be in the loop in order for
14 something to be made public may be certainly worth talking about
15 during discovery, but I do think the primary case on which the
16 plaintiff relies that publication, even to one or two people,
17 may be sufficient, McSurely v. McClellan, 753 Fed. 2d. 88, is
18 kind of a unique case that is not applicable across the board
19 and does not generally stand for the proposition that
20 publicizing it to one or two or three people is sufficient to
21 satisfy the elements of this tort.

22 The argument that the defendant makes that there is a
23 public interest in this kind of information I just reject.
24 Normally you balance the public's right to a certain kind of
25 information against the individual's right to privacy. It seems

1 to me that the public has no such right to this kind of
2 information about a person; that the individual's entitled to
3 maintain it privately, and there's no legitimate logical nexus
4 between the private facts allegedly disclosed here and the
5 matters of public interest that are invoked; namely, people are
6 interested in politics and in government, and everybody's
7 interested in relationships, whether they're financial
8 relationships or sexual relationships on Capitol Hill.

9 Financial relationships, maybe there is a strong public
10 interest in, and some of the things that have been in the press
11 recently about relationships between lobbyists and politicians
12 are of legitimate interest, and if somehow sex is involved in
13 that, maybe there is a public interest in it.

14 None of that is what's involved in this case. It's just
15 a -- and I know that Mr. Umana did not write the brief, but the
16 argument -- I just want to make sure I have the right thing --
17 the argument that the blog was newsworthy "as a shocking and
18 disturbing portrayal of casual and even reckless sexual
19 encounters between young entry-level Capitol Hill staffers like
20 Cutler and more senior staffers like Steinbuch, more prominent
21 executive branch officials and older, married, powerful and
22 wealthy men is of interest to the public," and "the
23 interrelationship between youth, beauty, sex, money and power in
24 Washington has long been a matter of legitimate and sometimes
25 pressing public interest," I just don't think carries the day

1 here.

2 What's involved in this case is not the fact of a
3 relationship between two people, but the intimate details of
4 that relationship. As I said before, facts surrounding sexual
5 intimacy are regarded as a classic example of private facts that
6 deserve protection, and comment B to the restatement says that,
7 that sexual relationships are normally entirely private matters.
8 Even public figures who do not have the same expectation of
9 privacy have an interest of privacy in those matters.

10 And Mr. Steinbuch's not a public figure. So I just reject
11 the notion that the relationship between the two of them was a
12 matter of public concern or interest, particularly the details
13 of the sex act they performed is just -- just doesn't carry the
14 day at all. That's not a basis to dismiss.

15 Intentional infliction of emotional distress -- I won't say
16 anything more about the other form of invasion of privacy that
17 is less explicitly alleged in paragraph 31 of the complaint,
18 which is publicity placing a person in a false light.

19 The restatement says one who gives publicity to a matter
20 concerning another that places the other before the public in a
21 false light is subject to liability to the other for invasion of
22 his privacy if A, the false light in which the other was placed
23 would be highly offensive to a reasonable person -- that kind of
24 parallels one of the elements of the other branch of this tort
25 we were just talking about -- and B, the actor had knowledge of

1 or acted in reckless disregard as to the falsity of the
2 publicized matter and the false light in which the other would
3 be placed.

4 And the reason I said before that we're going to have to
5 await the deposition of the defendant -- and Mr. Rosen said yes,
6 and of my client as well -- but the truth of the matter is I
7 think it's a hard claim to prove, and I'm sure I'm not telling
8 Mr. Rosen something he hasn't already thought about. It's a
9 hard claim to prove when you've only got two people, and they're
10 not necessarily objective facts.

11 And if she admits that she lied, misstated, if she admits
12 under oath that she made false statements or placed him in a
13 false light, that's one thing, but if it's "he said, she said,"
14 it may be a very hard case to carry a burden of proof on unless
15 there are going to be other witnesses coming in here. And I'm
16 not sure that Mr. Steinbuch's going to want to bring other
17 witnesses in on some of those issues. So just a note of
18 caution. But I do think the complaint states a claim under both
19 theories.

20 On the intentional infliction of emotional distress, in
21 this jurisdiction to sustain a claim or to state a claim for
22 intentional infliction of emotional distress plaintiff has to
23 allege extreme and outrageous conduct on the part of the
24 defendant -- that's one -- two, that either intentionally or
25 recklessly, three, caused the plaintiff severe emotional

1 distress.

2 Again, on a motion for dismissal for failure to state a
3 claim, I think this complaint states enough. The conduct is
4 alleged to be extreme and outrageous, not in so many words, but
5 that's what it says, and that it was done, it's alleged, both
6 initially and recklessly, or probably in the alternative, and
7 that it caused him severe emotional distress.

8 And I'm either going to have to decide on a motion for
9 summary judgment whether it doesn't meet that test, or if it
10 does, drawing all reasonable inferences in favor of the
11 nonmoving party, whether it's a matter that has to go to the
12 jury to see whether they think, on proper instructions, the
13 conduct was extreme or outrageous, and whether there's a causal
14 connection between the conduct and harm to the plaintiff.

15 Again, I agree that it's not stated in the complaint
16 exactly what that harm is, but there's enough there -- Mr. Rosen
17 made some statements today, it's a fruitful ground for discovery
18 to -- both document discovery and deposition discovery, what the
19 harm was, has he really lost a job, has he really lost income,
20 what has it done to his reputation in the communities in which
21 he operates. So I think there's enough to state a claim.

22 Now, with respect to the statute of limitations question,
23 there's basically two branches of one tort claim and then a
24 second tort claim. So the question is what is the statute of
25 limitations under invasion of privacy, namely an unreasonable

1 publicity given to the other person's private life; what is the
2 statute of limitations for right of privacy invasion by putting
3 someone in a false light.

4 If any of them is a three-year statute of limitation, then
5 there's absolutely no problem for the one that's a three-year
6 limitation. If they're one-year limitations, then there are
7 some problems.

8 The defendant -- I'm sorry, the plaintiff argues that the
9 statute of limitations for invasion of privacy, public
10 disclosure of private facts, is three years, and I think makes
11 the same argument with respect to intentional infliction of
12 emotional distress. But has conceded that with respect to false
13 light, it's one year. He also argues in the briefs that these
14 are a continuous act and that, I guess alternatively, that if it
15 were a one-year rule, that there's a question of when the
16 plaintiff discovered or reasonably could have discovered that he
17 had been wronged.

18 And we've gone back and forth about whether the blog was
19 public or wasn't public, and how public was it, and whether
20 Mr. Steinbuch could have had access to it or did have access to
21 it. But if it came to light not on the 6th or 7th of May but
22 somewhere later, it may be as late as the 18th, and it can be
23 established that he did not know and could not have known
24 without due diligence before some particular date after May 6 or
25 7, then some or all of these statements arguably fall within the

1 one-year statute of limitations, if there's a one-year statute
2 of limitations.

3 Now, a couple of different points to be made. I conclude
4 that there is a one-year statute of limitations with respect to
5 all three of these things. And the plaintiff relies in part on
6 a case from the District of Maryland, Smith v. Esquire, 494 F.
7 Supp. 967. And we have at least two extremely relevant D.C.
8 cases from this court. One is Southeastern University, Doe v.
9 Southeastern University, Judge Harris's decision in 732 F. Supp.
10 7, and the other more recent one by Judge Kessler, Grunseth v.
11 Marriott, 872 F. Supp. 1069.

12 And in Grunseth Judge Kessler points out, as I have today,
13 that there are actually four different theories for an invasion
14 of privacy claim. And she says that -- and the one that was
15 involved in the case before her was the primary one involved
16 here, public disclosure of private facts. And she says that
17 there is a one-year statute of limitations for libel, slander,
18 assault and other similar intentional torts, and that this
19 limitation has been applied to invasion of privacy claims, under
20 the rationale that invasion of privacy is essentially a type of
21 defamation. She said it's just Harris's approval in Doe v.
22 Southeastern.

23 She rejects the plaintiff's argument that the three-year
24 statute applies, and says that -- and then goes through the
25 elements of the third of the four theories under Wolf v.

1 Regardie, so it's clear that that's the one she's talking about.
2 So she has concluded the one-year statute applies to the third
3 of the four theories. In the restatement it's conceded that it
4 applies to the fourth of the four theories in the restatement.

5 And with respect to the intentional infliction of emotional
6 distress -- and so I agree with her. And with respect to the
7 intentional infliction of emotional distress, it's clear that
8 the question is whether it's -- I can't remember the exact
9 language, but whether it's officially intertwined with the
10 underlying violation, then the same statute of limitations
11 applies.

12 And by the nature of the complaint I think the allegations
13 are that the intentional infliction of emotional distress claim
14 is very much intertwined with the invasion of privacy claims,
15 and therefore seems to me that it follows from my finding or
16 conclusion that it's a one-year statute of limitations for the
17 invasion of privacy claims, the same will be true with the
18 intentional infliction of emotional distress claims. Thomas v.
19 News World Communications, 681 F. Supp. 55, and Dooley v. United
20 Technology Corporation, 1992 Westlaw 167053, a 1992 case.

21 But when does the one year start to run, is the question.
22 Mr. Umana argued that, you know, multiple publication rule and
23 once you publish it once it runs from that date. The Mullin
24 case that he mentions, Mullin v. Washington Free Weekly, 785 A.
25 2d 296, is essentially, Judge Steadman's opinion there is

1 talking about the old common law multiple publication rule. And
2 what that's all about is in the old days every time you called
3 somebody a thief, you slandered them again, and if you said it
4 20 times, there were 20 separate slanders, defamations, or
5 libels.

6 And as he points out, it's sort of -- the reason it
7 developed at common law was this was the time of Thomas Payne's
8 pamphlets and things like that. He said "such a rule began to
9 produce bewildering results after the rise of mass periodicals."
10 Well, imagine the bewildering results after the rise of the
11 Internet.

12 If you're saying the exact same thing, in the old days,
13 over and over again, maybe it's a separate libel. But here
14 we're talking about not saying the same thing; we're talking
15 about saying separate things. And we're also talking about the
16 possibility of the statement made over the Internet or on the
17 blog on day one, could have been changed or altered on day six,
18 and wasn't the identical statement. We also don't know when it
19 first became public.

20 Mullin, by the way, also is one of those cases that had as
21 an issue before it the discovery rule. And in Mullin, Judge
22 Steadman says the statute of limitations will not run until the
23 plaintiff knows or reasonably should have known that he suffered
24 injury due to the defendant's wrongdoing. So similarly here.

25 I think we have a lot of questions as to when the statute

1 began to run with respect to each of the statements or all of
2 the statements or some of the statements. And that's going to
3 be a matter for discovery, but at least you'll now know that
4 you've got to operate on the notion that I believe there's a
5 one-year statute of limitations.

6 So unless I've missed something, those are my reasons for
7 denying the motion to dismiss.

8 MR. UMANA: Your Honor, I just want to state that on
9 the last question of fact you raised about how a blog works, if
10 you change a blog in any way, it posts the exact date and time
11 that you changed it, so you can't go back and say, I want to
12 rewrite what I did on May 7, 2004. If you do that, then that's
13 a separate entry. I don't know if that helps or changes your
14 analysis.

15 THE COURT: It doesn't change my analysis on a motion
16 to dismiss.

17 MR. ROSEN: No, it's not true. It technically doesn't
18 work that way. I'm actually getting an expert in the area and
19 we can submit proof that it doesn't work that way. And in fact,
20 in this case she did in fact change it.

21 THE COURT: Well, it seems to me that if, during
22 discovery you want to each propose an expert or experts on this,
23 you can do it, or it may not be relevant depending upon what
24 fact discovery shows. It may turn out not to be important. Or
25 if we get to a point where discovery is closed on fact discovery

1 and you want to propound an expert affidavit on summary judgment
2 or experts for trial, you can do what you want to do. But if I
3 were you I wouldn't want to spend my money at this point to
4 engage experts in it, really focus on the facts.

5 I know this is the kind of lawsuit which can get very
6 nasty, but if I were advising you or your clients, who
7 presumably are paying money for your services, I think a lot
8 could be accomplished just by taking the plaintiff's deposition
9 and the defendant's deposition. And then you may have to go to
10 a slightly larger group. Rather than just being litigious and
11 deposing everybody in the world, you might want to start slowly
12 and see how far you get.

13 What I would suggest is this. Under our local rules, it's
14 local civil rule 16.3, the next step, unless of course Mr. Rosen
15 wants to amend his complaint -- that's up to him, but even if he
16 does, it's not going to change much. The next step is for the
17 two lawyers to get together and go through the checklist under
18 rule 16.3 and come up with a discovery plan and what you want to
19 do, whether you want to go to alternative dispute resolution now
20 or later, what kind of discovery you want to propose.

21 Hopefully you can agree on how many depositions and how to
22 proceed and how much time you need, whether or not you want to
23 do it in phases or not. I really don't care. But try to work
24 out an agreement. I know you're new to the case so you may need
25 a little time to think about it. Where do you practice out of,

1 Mr. Rosen?

2 MR. ROSEN: New Jersey and Florida.

3 THE COURT: Assuming you can agree on most things,
4 even if there are some minor points of disagreement, then you
5 submit a joint report. Make it a joint report even if you say
6 we disagree about this or that. I don't know that we need to
7 actually come back and have another status conference and make
8 you travel.

9 Why don't you come up with a discovery plan, follow the
10 rules, file it in the next couple of weeks. And then I'll just
11 issue a scheduling order.

12 MR. UMANA: Your Honor, I would just as soon move
13 towards a quick trial in this case. And if Your Honor feels
14 that these factual questions have to be decided, that's the way
15 to do it, that's the way I do things. I'd like to just move the
16 case along.

17 MR. ROSEN: And me too, Your Honor. I'd like to move
18 it along, and I think we can come up with a schedule and do it
19 in an expedited matter. We'd like to dispose of it and get
20 through this as quickly as possible.

21 THE COURT: Okay. Well, that sounds like a good way
22 to begin. The other thing that I'll ask you is this: On the
23 issue of discovery, again, I see this as a case that could get
24 litigious, and I don't like motions to compel and I don't like
25 to spend a lot of time on those things. And typically what I do

1 is I say if you've got any problems, work them out. If you
2 can't work them out, we'll have a telephone conference call.

3 But if you are already foreseeing things that might get
4 more complicated or time-consuming than that, I could refer the
5 matter to one of our magistrate judges, who are very good, all
6 of them are very good, so that you've got somebody that's always
7 available to help you sort through these things if you're going
8 to have some problems.

9 You're shaking your head up and down, so maybe --

10 MR. ROSEN: Just one question: That's regarding
11 discovery, that the magistrate would be assigned?

12 THE COURT: Yes, just for discovery purposes. Does
13 that sound like a good idea to you?

14 MR. ROSEN: Sure.

15 MR. UMANA: If you wouldn't mind just taking those
16 telephone calls, I think we could cut through a lot of this,
17 Your Honor, without extensive briefing.

18 THE COURT: Well, the reason --

19 MR. UMANA: The issues here are not that difficult. I
20 don't think this case should have been brought and --

21 THE COURT: The reason I tell people I'll take the
22 telephone calls is in order to discourage them from making any
23 telephone calls. Because in a lot of cases if you tell people,
24 if you've got a problem you can't work out, you call me, that
25 means they'll work it all out. This seems to be the kind of

1 case that that's not going to happen.

2 And I don't want to volunteer to take the telephone calls
3 if there are going to be many. I only want to volunteer to take
4 the telephone calls if it will discourage you from making any of
5 them. And I just have a feeling in this case, Mr. Umana,
6 because, just of the nature of the case.

7 And Mr. Steinbuch's a lawyer, and I don't know your
8 client's background, but even though he's a lawyer, he feels
9 very, very strongly about this whole thing. And there are some
10 kinds of cases -- you know, when it's about money, lawyers can
11 work things out. Sometimes when it's about sex, they can't work
12 it out as easily because they've got clients that are pushing
13 them, and they may need a referee, and I'm not as available to
14 play that role as the magistrate judge would be.

15 I'm still not encouraging you to file lots of motions to
16 compel and things. Try to work out a deal with them where
17 they'll take phone calls or very preliminary briefs and so on.
18 I'm inclined to refer it to a magistrate judge. So when I get
19 your joint proposal for a scheduling order, I'll issue the
20 scheduling order and I'll refer it to a magistrate judge.

21 And you know, if you can both agree on a reasonably
22 expedited period, then we can get it to a motion for summary
23 judgment and/or a trial reasonably quickly. But I don't think
24 we need to have you come back from New Jersey just to talk about
25 scheduling. So you should be able to agree pretty much on that

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at least.

MR. ROSEN: Yes.

THE COURT: Okay.

MR. UMANA: Thank you, Judge.

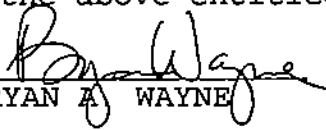
THE COURT: Thank you.

(Proceedings adjourned at 4:17 p.m.)

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CERTIFICATE

I, BRYAN A. WAYNE, Official Court Reporter, certify that the foregoing pages are a correct transcript from the record of proceedings in the above-entitled matter.


BRYAN A. WAYNE